

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION

MDL 1566
2:03-CV-01431-PMP-PAL
BASE FILE

HEARTLAND REGIONAL MEDICAL
CENTER, et al.,

2:07-CV-00987-PMP-PAL

Plaintiffs,

v.

ORDER RE: DEFENDANT'S MOTION
TO DISMISS (Doc. #1291)

ONEOK, INC., et al.,

Defendants.

Presently before this Court is Defendant Reliant Energy, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #1291).¹ Plaintiffs filed an Opposition (Doc. #1451) and supporting exhibits (Doc. #1452, #1473). Defendant filed a Reply (Doc. #1486).²

I. BACKGROUND

A. Procedural Background

This case is one of many in consolidated Multidistrict Litigation arising out of the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the Circuit Court of Buchanan County, Missouri. (Notice of Removal, Compl. [2:07-CV-00987-PMP-PAL,

¹ Document numbers refer to the base file, 2:03-CV-01431-PMP-PAL, unless otherwise noted.

² Defendants Reliant Energy, Inc., Reliant Energy Services, Inc., and Plaintiffs also entered into a stipulation of fact (Doc. #1446) and a stipulation to utilize jurisdictional discovery produced in the related cases (Doc. #1420).

1 Doc. #1].) Defendants removed the case to the United States District Court for the Western
2 District of Missouri. (Id.) The Judicial Panel on Multidistrict Litigation entered a Transfer
3 Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in this Court for
4 coordinated or consolidated pretrial proceedings. (Conditional Transfer Order [2:06-CV-
5 1351-PMP-PAL, Doc. #8].)

6 In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate
7 payers. In the Complaint, Plaintiffs allege Defendants engaged in anti-competitive
8 activities with the intent to manipulate and artificially increase or control the price of
9 natural gas for consumers. (Am. Compl. (Doc. #1260) at 28-37.) Specifically, Plaintiffs
10 allege Defendants knowingly delivered false reports concerning trade information and
11 engaged in wash trades, in violation of Missouri Antitrust Law, R.S. Mo. § 416.010, et seq.
12 (Id.)

13 Plaintiffs Heartland Regional Medical Center and Prime Tanning Corp. are
14 Missouri non-profit companies with their principal places of business in Missouri. (Id. at
15 3.) Plaintiffs allege they purchased natural gas directly from one or more Defendants, and
16 from other natural gas sellers in the State of Missouri, during the past six years. (Id.)
17 According to the Complaint, Defendants are natural gas companies that buy, sell, transport,
18 and store natural gas, including their own and their affiliates' production, in the United
19 States and in the State of Missouri. (Id. at 3-27.)

20 The Amended Complaint's allegations are directed generally at two types of
21 Defendants: the natural gas companies that actually engaged in natural gas sales and the
22 related reporting of allegedly manipulated gas prices to the trade indices, and those
23 companies' parent corporations. The Amended Complaint does not allege the parent
24 company Defendants themselves engaged in natural gas trading and price reporting.
25 Rather, the Amended Complaint alleges these Defendants are the parent companies of
26 subsidiaries which engage in such activity generally, and which also made natural gas sales

1 in Missouri during the relevant time period.

2 Plaintiffs seek to establish personal jurisdiction over the parent company
3 Defendants based on their out-of-forum activities directed at Missouri along with their
4 subsidiaries' and affiliates' contacts within Missouri. According to the Amended
5 Complaint, the parent company Defendants dominated and controlled their respective
6 subsidiaries and the parent company Defendants "entered into a combination and
7 conspiracy . . . which tended to prevent full and free competition in the trading and sale of
8 natural gas, or which tended to advance or control the market prices of natural gas." (Id. at
9 3, 6, 10, 12, 14, 16, 18, 22, 24-25.) Plaintiffs allege the parent company Defendants
10 intended their actions to have a direct, substantial, and foreseeable effect on commerce in
11 the State of Missouri. (Id. at 4, 6, 10, 12, 14-16, 18, 22, 24-25.) According to the Amended
12 Complaint, the parent company Defendants "made strategic marketing policies and
13 decisions concerning natural gas and the reporting of natural gas trade information to
14 reporting firms for use in the calculation of natural gas price indices that affected the market
15 prices of natural gas, and those policies and decisions were implemented on an operational
16 level by affiliates . . . in the United States and in Missouri." (Id. at 4, 7, 10-11, 13, 15-16,
17 19, 22, 24-26.)

18 Defendant Reliant Energy, Inc. ("REI") now moves to dismiss, arguing this Court
19 lacks personal jurisdiction over it. According to REI, it conducts no business in Missouri
20 and has no other contacts supporting general or specific jurisdiction. REI also argues it
21 cannot be subject to jurisdiction in Missouri based on its subsidiary's contacts with the
22 forum because its subsidiary is not its agent or alter ego. REI thus argues exercising
23 personal jurisdiction in this case would violate constitutional due process requirements.

24 Plaintiffs respond that REI's subsidiary has submitted to jurisdiction in Missouri
25 and REI is subject to personal jurisdiction through agency and alter ego principles based on
26 its subsidiary's contacts with the forum. Additionally, Plaintiffs request the Court defer

1 ruling until after the magistrate judge resolves certain jurisdictional discovery disputes, or to
2 delay ruling on the jurisdictional question until merits discovery is completed because the
3 jurisdictional questions are intertwined with the merits.

4 **B. Facts Related to Personal Jurisdiction**

5 Defendant REI is a Delaware corporation with its principal place of business in
6 Texas. (Def. Reliant Energy, Inc.'s Mot. to Dismiss for Lack of Pers. Juris. (Doc. #1291),
7 Ex. A ["Jines Decl.,"] at 1.) REI as it currently exists came into being in response to
8 changes in Texas regulatory laws. (Id. at 1-2.) The company formerly known as Reliant
9 Energy, Incorporated divided itself into CenterPoint Energy, Inc. ("CenterPoint") and
10 Reliant Resources, Inc. ("RRI"). (Id. at 2.) After CenterPoint divested itself of its RRI
11 stock, the two companies became separate entities and RRI changed its name to REI, the
12 Defendant in this action. (Id.) Under the Master Separation Agreement resulting in RRI's
13 existence as a separate entity, RRI agreed that it would indemnify, defend, and hold
14 harmless Reliant Energy, Incorporated, and in certain cases, that it would cause its
15 subsidiaries to do so as well, for liabilities arising out of RRI and its subsidiaries' business
16 operations, including business operations that pre-dated the agreement. (Notice of Filing
17 Docs. Under Seal ["Sealed App.,"] (Doc. #1473), Ex. E at REILJ012883, Ex. F at
18 REILJ009719.)

19 REI is a holding company that does not itself buy, sell, or transport natural gas,
20 nor does it report natural gas prices to any price reporting firms or price index publishers.
21 (Jines Decl. at 1, 3; Joint Supplemental Mem. of Defs. CMS Energy Corp., Duke Energy
22 Carolinas, LLC, & Reliant Energy, Inc. in Supp. of Mots. to Dismiss for Lack of Pers. Juris.
23 (Doc. #963), Reliant Energy, Inc.'s App. in Supp. of Its Mots. to Dismiss for Lack of Pers.
24 Juris. ["REI App.,"], Ex. B at 2.) REI does not have any offices, employees, property, bank
25 accounts, phone listings, or mailing addresses in Missouri. (Jines Decl. at 3-4.) REI does
26 not pay taxes in Missouri and has never sold or traded natural gas in Missouri. (Id.) Other

1 than advertising in publications available nationwide, REI has not directed advertising
2 specifically towards Missouri. (Id.)

3 REI has a wholly owned subsidiary, Reliant Energy Services, Inc. (“RES”).
4 (Jines Decl. at 3.) RES formerly was known as NorAm Energy Services, Inc., and it already
5 existed as a subsidiary of NorAm Energy Corp. when a company called Houston Industries
6 Incorporated acquired NorAm Energy Corp. in 1997. (REI & RES’s Stip. of Fact in
7 Connection With Pers. Juris. Disc. (Doc. #1446) [“Stip.”] at 2.) In 1999, Houston
8 Industries Incorporated changed its name to Reliant Energy, Incorporated and NorAm
9 Energy Services, Inc. changed its name to RES. (Id.) On December 31, 2000, RES became
10 REI’s wholly owned subsidiary through the Master Separation Agreement between REI and
11 Centerpoint. (Id.)

12 RES concedes personal jurisdiction in Missouri. (Id. at 2.) However, RES did
13 not have any agency agreements or powers of attorney for REI, nor did it register or file as a
14 foreign corporation to do business in Missouri on REI’s behalf. (Id. at 4.)

15 REI and RES share physical offices in Texas. (App. to Heartland’s Opp’n to
16 Reliant’s Mot. to Dismiss for Lack of Pers. Juris (Doc. #1452), Ex. B [“Jines Dep.”] at
17 163-64.) REI and its subsidiaries, including RES, share some common officers and
18 directors. (Sealed App., Exs. C, D.) For example, Michael Jines (“Jines”) was an officer
19 for REI, RES, and several other REI subsidiaries, including some for which he could not
20 recall the subsidiary’s name. (Jines Dep. at 15-19, 107-110.) At his deposition, Jines stated
21 his duties and responsibilities as an officer and director of those subsidiaries would be “no
22 different” than his duties and responsibilities as REI’s general counsel. (Id. at 119-20.) As
23 RES’s one hundred percent owner, REI nominates and elects the directors for RES. (Id. at
24 88-89.)

25 At the present time, REI and RES have no employees of their own. (Id. at 248,
26 288-89.) Rather, Reliant Energy Corporate Services (“RECS”), an REI subsidiary, acts as

1 the payroll entity for REI and all of its subsidiaries. (Id. at 9-10.) RECS employs personnel
2 who provide services to REI and RES. (Id. at 10.) For example, lawyers employed by
3 RECS provide legal services to REI and all of its subsidiaries. (Id. at 111-13.) RECS also
4 provides accounting, finance, legal, human resources, and facilities management services to
5 REI and its subsidiaries. (Id. at 20.) As part of these services, RECS prepares separate
6 financial documents, including tax filings, for RES. (Id. at 56-57, 267.) REI permitted
7 RES to use the “Reliant Resources” and “Reliant Energy” trademarks and trade names
8 during the relevant period. (Stip. at 4.)

9 In terms of financial dealings between REI and its subsidiaries, the subsidiaries
10 are funded by borrowing from or receiving equity capital infusions from REI. (Jines Dep.
11 at 239-40.) In turn, REI receives either loan repayments or dividends when money is
12 transferred from the subsidiaries to REI. (Id. at 291-92.) REI received dividends from RES
13 during the relevant time period. (Stip. at 4.) In some circumstances, REI provides
14 guarantees to third parties in transactions involving REI subsidiaries. (Jines Dep. at 204-
15 05.) REI agreed to be RES’s guarantor when RES’s counterparties required it. (Stip. at 2.)
16 In setting forth its financial guarantee policy, REI (then RRI) described RES as a “business
17 unit.” (Sealed App., Ex. H at REILJ010083.) REI acted as RES’s guarantor on a contract
18 with Aquila Energy Marketing Corporation, a company with a Missouri address. (Sealed
19 App., Ex. R.)

20 Although describing itself as a holding company, REI does not passively hold
21 stock in its subsidiaries and leave them to operate on their own. Rather, REI establishes
22 overall policies and guidelines for its subsidiaries, establishes a capital structure, and issues
23 consolidated financial reports. (Jines Dep. at 131.) Among the guidelines REI requires its
24 subsidiaries to follow is a policy for best principles and practices. (Sealed App., Ex. I at
25 REILJ012703.) This policy requires compliance with applicable laws and regulations, and
26 requires that all transactions be for a bona fide business purpose and be reported accurately.

1 (Id.) The best practices policy prohibits wash sales and fictitious transactions. (Id. at
2 REILJ012704.) This policy applied to RES during the relevant period. (Sealed App., Ex. N
3 at 93.)

4 Additionally, REI sets certain risk control limits on its subsidiaries. For example,
5 REI set limits on RES's value at risk ("VAR"). (Sealed App., Ex. F at REILJ009749.)
6 REI's board of directors sets the overall limit on VAR. (Id.) The Audit Committee of
7 REI's board meets at least three times a year to approve the risk control organization
8 structure, approve the overall risk control policy, monitor compliance with trading limits,
9 and review risk control issues. (Id. at REILJ009752.)

10 REI also has a Risk Oversight Committee consisting of REI and subsidiary
11 officers which allocates VAR to various business segments, including RES. (Sealed App.,
12 Ex. M at 17, Ex. F at REILJ009752.) The Risk Oversight Committee meets at least
13 monthly to monitor compliance, review daily position reports for trading and marketing
14 activity, recommend to REI's board of directors adjustments to trading limits, approve new
15 trading activity, monitor information systems related to risk management, and place
16 guidelines and limits on hedging activity. (Sealed App., Ex. F at REILJ009752-53.)
17 Management for each business segment then allocates risk limits among individual traders
18 within the limits set by the Risk Oversight Committee. (Id. at REILJ009754.) RES
19 allocates VAR to its "head book traders" who in turn authorize other traders to execute
20 trades. (Sealed App., Ex. M at 17.) Thus, the VAR limit set by REI was "an overall limit."
21 (Sealed App., Ex. N at 155.) RES would engage in multiple transactions in one day, and
22 the limit set by REI was evaluated against the net result of a set of RES's transactions or
23 activities. (Id.)

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1 REI oversight of its subsidiaries includes daily reporting of mark-to-market
2 valuation,³ VAR, and “other risk measurement metrics.” (Sealed App., Ex. L.) RES’s
3 VAR is reported daily to REI’s Risk Oversight Committee. (Sealed App., Ex. M at 17.)
4 Additionally, violations of any risk limits are reported to the business segment management
5 as well as to the appropriate committees. (Sealed App., Ex. F at REILJ009754.) While the
6 reports from the subsidiary to the various committees may occur daily, communications
7 from REI down to the subsidiaries occurs “only to the extent that the activity ended up in a
8 violation.” (Sealed App., Ex. N at 156.) For example, if RES exceeded its VAR limit, an
9 REI officer may inform RES management and inquire as to what RES management
10 intended to do to correct the situation. (Id.) However, “in terms of the day-to-day buying
11 and selling of gas or power, [REI officers have] limited or no interaction.” (Id.)

12 In November 2003, the Commodity Futures Trading Commission (“CFTC”)
13 entered into a settlement with RES regarding the CFTC’s allegations that RES violated the
14 Commodities Exchange Act. (Decl. of William E. Fischer (Doc. #1104), Ex. B, Jines Ex.
15 4.) According to the settlement, the CFTC found RES’s Houston offices made false price
16 reports regarding natural gas transactions from 1999 through May 2002. (Id. at 4-5.)
17 Additionally, the CFTC found RES engaged in wash trades in 2000. (Id. at 6-7.) As part of
18 the settlement, RES and REI agreed to entry of the order finding violations, as well as
19 requiring RES to cease and desist from its misconduct, imposing an \$18 million civil
20 penalty on RES, and requiring RES and REI to undertake certain activities. (Id. at 7-9.)
21 Specifically, REI agreed to cooperate with the CFTC in the future, including preserving and
22 producing records regarding the reporting of price or trade volumes in natural gas
23 transactions and producing RES and REI employees to provide assistance in any trial,
24 proceeding, or investigation related to the CFTC’s investigation. (Id. at 8-9.) Additionally,

25 ³ “Mark-to-market” means the value of a contract relative to current market prices. (Sealed
26 App., Ex. N at 128.)

1 REI agreed not to make any public statements denying the CFTC's findings in the order.
 2 (Id. at 9.) Jines represented both RES and REI relating to the CFTC's investigation and the
 3 terms of the CFTC's order. (Jines Dep. at 41-44.)

4 RES stopped speculative gas trading in March 2003. (Stip. at 3; Sealed App., Ex.
 5 G.) Since then, RES "has continued to buy and sell natural gas for the purpose of meeting
 6 and hedging its obligations to supply gas-fired power plants owned by Reliant Energy
 7 Power Generation, Inc. and other RES affiliates, and to meet gas supply commitments it has
 8 made." (Stip. at 3.)

9 **II. PERSONAL JURISDICTION**

10 "When a defendant moves to dismiss for lack of personal jurisdiction, the
 11 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
 12 defendant." Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
 13 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
 14 permitted under the applicable state's long-arm statute and (2) that the exercise of
 15 jurisdiction does not violate federal due process. Id. The Court must analyze whether
 16 personal jurisdiction exists over each defendant separately. Harris Rutsky & Co. Ins.
 17 Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1130 (9th Cir. 2003).

18 Where the issue is before the Court on a motion to dismiss based on affidavits
 19 and discovery materials without an evidentiary hearing, the plaintiff must make "a prima
 20 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
 21 dismissal." Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114,
 22 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations in the
 23 complaint and resolves any conflicts between the facts contained in the parties' evidence in
 24 the plaintiff's favor. Id. However, for personal jurisdiction purposes, a court "may not
 25 assume the truth of allegations in a pleading which are contradicted by affidavit."
 26 Alexander v. Circus Circus Enters., Inc., 972 F.2d 261, 262 (9th Cir. 1992) (quotation

1 omitted).

2 In diversity cases such as this, “a federal court applies the personal jurisdiction
3 rules of the forum state provided the exercise of jurisdiction comports with due process.”
4 Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). However, “federal law is controlling
5 on the issue of due process under the United States Constitution.” Data Disc, Inc. v. Sys.
6 Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3 (9th Cir. 1977); see also Dole Food Co., Inc. v.
7 Watts, 303 F.3d 1104, 1110 (9th Cir. 2002). Therefore, the Court will apply law from the
8 United States Court of Appeals for the Ninth Circuit in deciding whether jurisdiction is
9 appropriate under the Due Process Clause. See In re Korean Air Lines Disaster of Sept. 1,
10 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987) (concluding that “the transferee court [should]
11 be free to decide a federal claim in the manner it views as correct without deferring to the
12 interpretation of the transferor circuit”); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir.
13 1993) (holding that “a transferee federal court should apply its interpretations of federal
14 law, not the constructions of federal law of the transferor circuit”).

15 To satisfy federal due process standards, a nonresident defendant must have
16 “minimum contacts” with the forum state so that the assertion of jurisdiction does not
17 offend traditional notions of fair play and substantial justice. Pebble Beach Co., 453 F.3d at
18 1155 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945)). A federal district
19 court may exercise either general or specific personal jurisdiction. See Helicopteros
20 Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984).

21 To establish general personal jurisdiction, the plaintiff must demonstrate the
22 defendant has sufficient contacts to “constitute the kind of continuous and systematic
23 general business contacts that ‘approximate physical presence.’” Glencore Grain, 284 F.3d
24 at 1124 (quoting Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1086 (9th
25 Cir. 2000), modified, Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433
26 F.3d 1199, 1207 (9th Cir. 2006)). Courts consider such factors as whether the defendant

1 makes sales, solicits or engages in business in the state, serves the state's markets,
2 designates an agent for service of process, holds a license, or is incorporated there.
3 Bancroft, 223 F.3d at 1086. "[A] defendant whose contacts are substantial, continuous, and
4 systematic is subject to a court's general jurisdiction even if the suit concerns matters not
5 arising out of his contacts with the forum." Glencore Grain, 284 F.3d at 1123 (citing
6 Helicopteros, 466 U.S. at 415 n.9).

7 A nonresident defendant's contacts with the forum state may permit the exercise
8 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
9 the forum or purposefully availed himself of the privileges of conducting activities within
10 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
11 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
12 Pebble Beach Co., 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
13 jurisdiction in the forum would deprive the defendant of due process of law." Omeluk v.
14 Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995).

15 Under the first prong of the "minimum contacts test," the plaintiff must establish
16 either that the defendant "(1) purposefully availed himself of the privilege of conducting his
17 activities in the forum, or (2) purposefully directed his activities toward the forum." Pebble
18 Beach Co., 453 F.3d at 1155. "Evidence of availment is typically action taking place in the
19 forum that invokes the benefits and protections of the laws in the forum." Id. Evidence of
20 direction usually consists of conduct taking place outside the forum that the defendant
21 directs at the forum. Id. at 1155-56.

22 The purposeful direction aspect of the first prong is satisfied when a foreign act is
23 both aimed at and has effect in the forum. Id. In other words, the defendant "must have (1)
24 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
25 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
26 suffered in the forum state." Id. To satisfy the third element of this test, the plaintiff must

1 establish the defendant's conduct was "expressly aimed" at the forum; a "mere foreseeable
2 effect" in the forum state is insufficient. Id. The "express aiming" requirement is satisfied
3 when the defendant is alleged to have engaged in wrongful conduct "individually targeting
4 a known forum resident." Bancroft, 223 F.3d at 1087.

5 The second prong of the specific jurisdiction test requiring that the contacts
6 constituting purposeful availment or purposeful direction give rise to the current action is
7 measured in terms of "but for" causation. Id. at 1088. "If the plaintiff establishes both
8 prongs one and two, the defendant must come forward with a 'compelling case' that the
9 exercise of jurisdiction would not be reasonable." Boschetto v. Hansing, 539 F.3d 1011,
10 1016 (9th Cir. 2008) (quotation omitted).

11 Plaintiffs are not contending this Court may assert personal jurisdiction over REI
12 based on REI's own contacts with Missouri. (Pls.' Opp'n to Reliant Energy, Inc.'s Mot. to
13 Dismiss for Lack of Pers. Juris. (Doc. #1451) at 3.) Consequently, REI is subject to
14 personal jurisdiction in Missouri only if the forum acts of its subsidiary, RES, are
15 attributable to it through alter ego or agency principles.⁴

16 **A. Alter Ego**

17 A "parent-subsidary relationship alone is insufficient to attribute the contacts of
18 the subsidiary to the parent for jurisdictional purposes." Harris Rutsky & Co. Ins. Servs.,
19 Inc., 328 F.3d at 1134. However, a subsidiary's contacts may be imputed to its parent for
20 personal jurisdiction purposes where the subsidiary is the parent's alter ego. Id.

21 To demonstrate a parent and its subsidiary are alter egos, the plaintiff must
22 establish a prima facie case that the two companies share "such unity of interest and
23 ownership" that the companies' separateness no longer exists and "failure to disregard
24 [their separate identities] would result in fraud or injustice." Doe v. Unocal Corp., 248 F.3d

25 ⁴ The Court will assume that if RES's forum-related acts are attributable to REI, the Missouri
26 long-arm statute is satisfied.

1 915, 926 (9th Cir. 2001) (quotation omitted). To demonstrate a unity of interest warranting
 2 disregard of corporate separateness, the plaintiff must show the parent controls its
 3 subsidiary to such a degree as to render the subsidiary a “mere instrumentality” of its parent.
 4 Id. (quotation omitted). Typically, this would involve showing the parent controls the
 5 subsidiary’s internal affairs or daily operations. Kramer Motors, Inc. v. British Leyland,
 6 Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980).⁵

7 A parent corporation may be involved directly in certain aspects of its wholly
 8 owned subsidiary’s affairs without subjecting itself to alter ego status. For example, a
 9 parent may provide financing to its subsidiary so long as it maintains corporate formalities
 10 and properly documents loans and capital contributions to its subsidiaries, and it may act as
 11 its subsidiary’s guarantor. Doe, 248 F.3d at 927-28. Additionally, a parent may refer to its
 12 subsidiaries as divisions of the parent in annual reports. Id. at 928. Further, a parent may
 13 review and approve major decisions, place its own directors on the subsidiary’s board, and
 14 share offices and staff with its wholly owned subsidiary without being considered its alter
 15 ego. Id.; Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135.

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17
 18 ⁵ Missouri employs a similar alter ego test. Under Missouri law, “when a corporation is so
 19 dominated by a person as to be a mere instrument of that person and is indistinct from the person
 20 controlling it, then the court will disregard the corporate form if to retain it would result in injustice.”
 21 East Attucks Cmty. Housing, Inc. v. Old Republic Sur. Co., 114 S.W.3d 311, 321-22 (Mo. Ct. App.
 22 2003) (quotation omitted). The party seeking to pierce the corporate veil must show such “complete
 23 domination” that “the corporate entity as to this transaction had at the time no separate mind, will or
 24 existence of its own.” Real Estate Investors Four, Inc. v. Am. Design Group Inc., 46 S.W.3d 51, 56
 25 (Mo. Ct. App. 2001) (quotation omitted). Additionally, the party seeking to pierce must show the
 26 corporation used such control to commit a fraud or wrong, to violate statutory or other positive legal
 duties, or to perpetrate a dishonest and unjust act in contravention of plaintiff’s legal rights. Id. Finally,
 the party must show “[t]he control and breach of duty” proximately caused the injury. Id. (quotation
 omitted). To the extent Missouri would look to the law of the state of incorporation to determine alter
 ego status, see In re Bridge Info. Sys., Inc., 325 B.R. 824, 830-31 (Bankr. E.D. Mo. 2005), Delaware
 has similar requirements. See Maloney-Refaie v. Bridge at Sch., Inc., 958 A.2d 871, 881 (Del. Ch.
 2008); In re Sunstates Corp. Shareholder Litig., 788 A.2d 530, 534 (Del. Ch. 2001).

1 In sum, a parent may involve itself directly in its subsidiary's activities without
2 becoming an alter ego "so long as that involvement is consistent with the parent's investor
3 status." Harris Rutsky & Co. Ins. Servs., Inc., 328 F.3d at 1135 (quotation omitted).
4 Activities consistent with investor status include "monitoring of the subsidiary's
5 performance, supervision of the subsidiary's finance and capital budget decisions, and
6 articulation of general policies and procedures[.]" Doe, 248 F.3d at 926 (quoting United
7 States v. Bestfoods, 524 U.S. 61, 72 (1998)).

8 In addition to showing lack of corporate separateness, the plaintiff also must
9 show that failure to disregard the corporate form would promote fraud or injustice. The
10 fraud or injustice must relate to the forming of the corporation or abuse of the corporate
11 form, not a fraud or injustice generally. Laborers Clean-Up Contract Admin. Trust Fund v.
12 Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 n.12 (9th Cir. 1984). For example,
13 undercapitalization at the subsidiary's inception may be evidence of the parent's fraudulent
14 intent. Id. However, a corporation that once was capitalized adequately but "subsequently
15 fell upon bad financial times" does not support a finding of fraud or injustice. Id. at 525.
16 Further, evidence that the corporation existed as an ongoing enterprise engaged in
17 legitimate business suggests no fraudulent intent or injustice to support piercing the
18 corporate veil. Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1113 (9th Cir. 1979).
19 An inability to collect on a judgment "does not, by itself, constitute an inequitable result."
20 Id.

21 Plaintiffs have failed to establish a prima facie case of personal jurisdiction based
22 on RES being REI's alter ego. REI provided financing to RES and in return received loan
23 repayments and/or dividends, but no evidence in the record suggests REI failed to maintain
24 corporate formalities or to properly document these loans and capital contributions. Rather,
25 the evidence indicates RECS prepared separate books and records for RES and REI.

26 ///

1 REI's conduct in acting as a guarantor for RES also does not support an alter ego
2 finding, and the evidence presented on this point suggests the opposite. REI had in place
3 specific policies regarding when it would consider acting as its subsidiary's guarantor,
4 suggesting that the two corporations and their counterparties viewed the two as separate
5 entities not liable for the other's obligations except where they contractually agreed to such
6 an arrangement. Further, REI's reference to RES as a "business unit" in a report does not
7 suggest RES was REI's mere instrumentality. Nor does the fact that the two companies
8 shared office space and staff.

9 REI's oversight of RES is consistent with the parent's investor status. As one
10 hundred percent owner of RES's shares, REI was entitled to nominate and elect RES's
11 board of directors. Additionally, REI is entitled as an investor to monitor RES's
12 performance. Consequently, the daily reporting of information from RES to REI is
13 consistent with REI's investor oversight role. Although REI received daily reporting from
14 RES, no evidence suggests REI gave daily control commands to RES. Rather, the record
15 demonstrates that, consistent with its investor status, REI set general policies and guidelines
16 regarding best policies and practices, as well as certain overall limits, such as the limit on
17 VAR. However, when it came to RES's day-to-day conduct of its business within these
18 guidelines, REI had little to no role. For example, with respect to natural gas trading, while
19 REI set overall limits on certain metrics, REI had no role in making the day-to-day
20 decisions of who RES was to trade with, when, for what amount of natural gas, and at what
21 price. Only when RES exceeded REI's overall limits would REI become involved by
22 inquiring of its subsidiary what it intended to do to correct any violations. Plaintiffs also
23 present no evidence REI had any role in RES's price reporting to indices.

24 Finally, Plaintiffs' reference to the Master Separation Agreement does not
25 support a finding of alter ego. That RRI/REI agreed with Reliant Energy, Incorporated that
26 it and its subsidiaries would assume liability for those business operations which would

1 remain with RRI/REI post-separation does not mean REI agreed it would waive personal
2 jurisdiction with respect to claims made by other persons not a party to that contract, or that
3 it, as opposed to the relevant subsidiary, was liable for any particular claim.

4 Even if Plaintiffs had established a lack of corporate separateness, Plaintiffs have
5 not established a fraud or injustice would result if the Court failed to pierce the corporate
6 veil. Plaintiffs contend it would be unjust to permit REI to reap the benefits of RES's
7 alleged unlawful behavior by enjoying profits from RES's trading activities while escaping
8 liability for RES's alleged misconduct. However, the alleged illegal price manipulation
9 cannot itself constitute the fraud or injustice necessary to pierce the corporate veil. Rather,
10 REI must have had some fraudulent intent at RES's inception or some later abuse of the
11 corporate form such that failing to treat the entities as one would be inequitable. Plaintiffs
12 present no evidence RES was undercapitalized at its inception. RES was formed years
13 before REI became its parent company, and thus REI was not even involved in capitalizing
14 RES at its inception. Further, the fact that RES operated as a legitimate business for years
15 suggests a lack of fraudulent intent or perpetration of a fraud through use of the corporate
16 structure on the parent's part.

17 Plaintiffs' fear that they may not be able to collect on a judgment in this action
18 against RES does not constitute fraud or injustice to support piercing the corporate veil.
19 The Court therefore finds Plaintiffs have not met their burden of establishing RES is REI's
20 alter ego, and the Court will not attribute RES's contacts with Missouri to REI for purposes
21 of determining personal jurisdiction based on alter ego principles.

22 **B. Agency**

23 A subsidiary's contacts also may be imputed to its parent for personal jurisdiction
24 purposes where the subsidiary is the parent's general agent in the forum. Harris Rutsky &
25 Co. Ins. Servs., Inc., 328 F.3d at 1134. A subsidiary is its parent's agent for purposes of
26 attributing its forum-related contacts to the parent if the subsidiary "performs services that

1 are ‘sufficiently important to the foreign corporation that if it did not have a representative
2 to perform them, the corporation’s own officials would undertake to perform substantially
3 similar services.’” Doe, 248 F.3d at 928 (quoting Chan v. Society Expeditions, Inc., 39
4 F.3d 1398, 1405 (9th Cir. 1994)). The ultimate inquiry is whether the subsidiary’s presence
5 in the forum “substitutes” for its parent’s presence. Id. at 928-29 (quotation omitted).

6 Where the parent is merely a holding company, the subsidiary’s forum-related
7 contacts are not done as the parent’s agent because the holding company “could simply hold
8 another type of subsidiary” as an investment and thus the subsidiary conducts business not
9 as the parent’s agent but as its investment. Id. at 929. “Where, on the other hand, the
10 subsidiaries are created by the parent, for tax or corporate finance purposes, there is no
11 basis for distinguishing between the business of the parent and the business of the
12 subsidiaries.” Id. (quotation omitted). The inquiry as to whether a subsidiary is its parent’s
13 general agent in the forum is “a pragmatic one.” Gallagher v. Mazda Motor of Am., Inc.,
14 781 F. Supp. 1079, 1085 n.10 (E.D. Pa. 1992).

15 For example, where a Japanese parent company was engaged in the manufacture
16 of watches, its subsidiaries that acted as its sole sales agents in America were “almost by
17 definition . . . doing for their parent what their parent would otherwise have to do on its
18 own.” Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1342
19 (E.D.N.Y. 1981). The Bulova court thus attributed the subsidiaries’ contacts to the parent
20 company. Id.; see also Chan, 39 F.3d at 1405-06 (remanding to the district court for
21 additional findings of fact regarding agency where the German parent corporation owned
22 and operated cruise ships and its local subsidiary marketed cruises and chartered cruise
23 ships and sold the cruise ticket to the plaintiffs out of which the claims arose); Modesto City
24 Schs. v. Riso Kagaku Corp., 157 F. Supp. 2d 1128, 1135 (E.D. Cal. 2001) (holding
25 subsidiary was parent’s agent for personal jurisdiction purposes where subsidiary acted as
26 sole conduit for marketing and selling parent’s products in the United States).

1 In contrast, where the parent company owned a subsidiary mining company's
2 stock but did not itself engage in the business of gold mining, imputing the subsidiary's
3 forum contacts to the parent was not appropriate. Sonora Diamond Corp. v. Superior Court,
4 99 Cal. Rptr. 2d 824, 840-41 (Ct. App. 2000). As the Sonora Diamond court explained, had
5 the parent company owned "the rights to the gold and used Sonora Mining as the operating
6 and marketing entity," then perhaps general jurisdiction over the parent company would be
7 appropriate because under those circumstances the parent company "could not reap the
8 benefits of its rights unless it or someone else removed and sold the ore." Id. But where
9 the parent simply held the mining company as an investment, the subsidiary's forum-related
10 contacts could not be imputed to the parent company. Id.

11 Likewise, in Doe, the Ninth Circuit concluded a foreign company's subsidiaries
12 were not its general agents in California because the plaintiffs presented no evidence that in
13 the absence of the California subsidiaries' involvement in petrochemical and chemical
14 operations, the parent would have conducted and controlled those operations. Doe, 248
15 F.3d at 929. The Court reached this conclusion even though the parent company issued
16 consolidated reporting, referred to a subsidiary in an annual report as its "US unit," and
17 stated that use of the subsidiary "would enable it to expand its marketing network and
18 produce higher value-added specialty products in the United States." Id.

19 Plaintiffs have failed to establish a prima facie case that RES was REI's general
20 agent in Missouri. REI's business is not purely as a holding company in the sense that it
21 does not passively hold stock in companies from an unrelated range of businesses. REI
22 (then RRI) has described itself as a "provider of electricity and energy services with a focus
23 on the competitive segments of the electric power industry in the United States and
24 Europe." (Sealed App., Ex. K at REILJ009826.) REI describes its business as acquiring,
25 developing, and operating electric power generation facilities; trading and marketing power,
26 natural gas, and other energy-related commodities; and providing retail electric services in

1 Texas. (Id.) REI has asserted in public filings that its--

2 trading, marketing, and risk management skills complement [its]
3 generation positions. The combination provides greater scale and skill
4 associated with the management of our fuel and power positions,
5 sophisticated commercial insights and an understanding of the key
6 regions in which we participate, and a wider range of ways in which
7 we participate in the market and are able to meet customer needs.

8 (Id.)

9 In practice, REI itself does not perform these activities, but, as Jines stated in his
10 deposition, REI “holds the shares of the different subsidiaries that are actually engaged in
11 the different business operations of [REI].” (Jines Dep. at 129-30.) Among those business
12 operations was REI’s “wholesale” group, which included a variety of subsidiaries involved
13 in wholesale-related activities, including RES’s natural gas-related activities. (Id. at 285-
14 86.)

15 Although REI identifies natural gas trading and marketing as one of its business
16 lines, Plaintiffs have not established that RES’s sales of natural gas in Missouri were
17 sufficiently important to REI that if RES did not make the sales in Missouri, REI would
18 have done so itself. As the California Court of Appeal found in evaluating this same
19 question involving a similar lawsuit against REI and RES in California, “[t]his portion of
20 the energy business appears to be sufficiently fragmentary so that [REI] could have
21 operated without the assistance of RES.” Reliant Energy, Inc. v. Superior Court, No.
22 D049988, 2007 WL 4329488, at *18 (Cal. Ct. App. 2007) (unpublished). Further, the fact
23 that REI subsequently ceased “proprietary trading activities” due to a significant trading
24 loss arising from “the extreme volatility in natural gas prices” suggests that RES’s trading
25 activities were not sufficiently important to REI that it would perform the activities itself if
26 RES did not do so on its behalf. (Sealed App., Ex. G.)

Moreover, Plaintiffs have presented no evidence that RES’s natural gas sales in
Missouri in particular were sufficiently important to REI’s business that REI would have

1 performed the sales in Missouri itself absent its subsidiary's representation in the forum.
2 See Modesto City Schs., 157 F. Supp. 2d at 1135 (noting twenty percent of parent's
3 products were sold through subsidiary which acted as parent's "sole conduit for marketing
4 and selling its products in the United States"); Bulova Watch Co., Inc., 508 F. Supp. at 1344
5 (noting that sixty percent of parent's products were sold as exports and the United States
6 was the parent company's largest export market through its New York subsidiaries' sales in
7 the United States). Consequently, Plaintiffs have not shown that RES's Missouri natural
8 gas sales played a significant role in REI's "organizational life" such that it acted as a
9 substitute for REI in the forum. Bulova Watch Co., Inc., 508 F. Supp. at 1344.

10 The Court acknowledges that the California Court of Appeal upheld a state trial
11 court's ruling that RES was REI's agent in California for natural gas trading activity during
12 the relevant time period. Reliant Energy, Inc., 2007 WL 4329488, at *17. Although arising
13 out of the same factual background and involving the same parent and subsidiary, the ruling
14 is distinguishable on several grounds. The evidence presented to the California state court
15 indicated REI had several significant contacts with California whereas Plaintiffs concede
16 REI has little to no contacts with Missouri, as reflected in the evidence before this Court.
17 According to the evidence in Reliant, REI owned another subsidiary that had purchased
18 natural-gas-fueled power plants located in California. Id. at *2. Additionally, REI obtained
19 a certificate of qualification to do business and designated an agent for service of process in
20 California, acted as guarantor on seven agreements between RES and California utilities,
21 engaged in a marketing campaign in the state, subleased a small office in Sacramento which
22 was used by a lobbyist, and employed an individual who allegedly engaged in illegal
23 churning and wash trades in California. Id. at *3-4.

24 In accord with this Court's ruling, the California Court of Appeal specifically
25 rejected RES was REI's agent under the same test the Ninth Circuit employs to determine
26 whether a subsidiary is its parent's agent for personal jurisdiction purposes. Compare id. at

1 *17-18, with Doe, 248 F.3d at 928. The California Court of Appeal referred to this test as
2 the “representative services doctrine.” Reliant Energy, Inc., 2007 WL 4329488, at *17-18.
3 While finding RES was not REI’s agent under the representative services doctrine, the
4 Reliant court concluded RES was REI’s agent in California under general agency principles
5 based on REI’s control over RES. Id. at *15-17. Although not calling it the “representative
6 services doctrine,” the Ninth Circuit has set forth that test as the applicable one for due
7 process purposes. The California Court of Appeal’s reference to other agency principles
8 goes beyond the applicable agency test as for exercising personal jurisdiction consistent
9 with due process set forth in controlling precedent for this Court.

10 Moreover, in making its finding under general agency principles, the California
11 Court of Appeal relied on evidence not presented to this Court and not relevant to REI’s
12 contacts with Missouri. For example, the Reliant court considered the fact that RES made a
13 daily report to REI of the California power plant’s hedging activities, “regarding the
14 coordination of power generation and supply of natural gas,” and RES’s trading activities
15 impacted that supply of natural gas. Id. at *16. Additionally, evidence in the record
16 permitted an inference that the employee who allegedly engaged in wash trades and
17 churning in California was an REI (then RRI) employee. Id.

18 The California Court of Appeal also found REI’s setting and raising of overall
19 limits such as VAR to be significant evidence of REI’s daily control of RES. However, as
20 explained above, the evidence before this Court indicates REI sets overall limits but does
21 not involve itself in RES’s day-to-day decisions as to what actions to take within those
22 limits. That RES violated those limits and requested a higher limit, to which REI agreed, is
23 not evidence of day-to-day control. It is evidence of a change in the overall limit under
24 which RES was to perform its day-to-day operations.

25 To the extent the setting and changing of VAR and other limits constitutes day-
26 to-day control, Plaintiffs have not demonstrated that REI’s setting or altering of overall

limits on any metric constituted day-to-day interference with RES's sales in Missouri. Plaintiffs have presented no evidence that REI's oversight impacted RES's daily decisions regarding whether, when, to whom, in what volume, or at what price RES decided to sell natural gas in Missouri. While daily oversight of trading activities may have been significant in the Reliant case where an employee of REI or one of its subsidiaries allegedly engaged in illegal trading activity in California, REI's daily oversight mechanisms as presented to this Court do not suggest a significant level of control over RES's Missouri sales activity. Because Plaintiffs have not established a prima facie case that RES acted as REI's agent in Missouri, the Court will not attribute RES's Missouri contacts to REI on this basis.⁶

C. Request for Deferred Decision

Plaintiffs suggest that because the personal jurisdiction question is intertwined with the merits, the Court should defer ruling on the personal jurisdiction issue until after merits discovery is completed. Plaintiffs rely on Data Disc, Inc., 557 F.2d at 1285 n.2. However, Data Disc, Inc. states that where the jurisdictional issues are intertwined with the merits, the Court may require the plaintiff to establish "only . . . a prima facie showing of jurisdictional facts with affidavits and perhaps discovery materials." Id. As the Court is

⁶ The result would be the same under general Missouri agency law. In Missouri, a principal is bound by his agent's acts where the agent has actual authority, either express or implied, or apparent authority. Lynch v. Helm Plumbing & Elec. Contractors, Inc., 108 S.W.3d 657, 660 (Mo. Ct. App. 2002). Implied actual authority arises when a reasonable person would interpret the principal's words or conduct to mean the principal desired the agent to act on the principal's behalf. Id. A principal may be bound where an agent acts with apparent authority if the principal manifested his consent to the exercise of such authority, the third party "had reason to believe, and actually believed, the agent possessed such authority," and the third party "changed his position and will be injured or suffer loss if the transaction executed by the agent does not bind the principal." Id. (quotation omitted).

Here, Plaintiffs have presented no evidence of any express or implied manifestation from REI to RES that RES may act as REI's agent in Missouri. As to apparent agency, Plaintiffs have presented evidence that REI permitted RES to use the "Reliant" name and logo in marketing natural gas in Missouri. However, Plaintiffs have presented no evidence that anyone relied on an apparent agency relationship between REI and RES.

1 considering the personal jurisdiction issue on the basis of affidavits and documentary
2 evidence without holding an evidentiary hearing, the Court is following Data Disc, Inc. by
3 holding Plaintiffs to this standard, and is not requiring Plaintiffs to meet the higher burden
4 of demonstrating personal jurisdiction by a preponderance of the evidence, as Plaintiffs
5 would have to do at an evidentiary hearing or at trial. Id.

6 Moreover, Plaintiffs have not convinced the Court that further discovery would
7 produce a different result. Plaintiffs and REI agreed to utilize the jurisdictional discovery
8 produced in the consolidated cases. REI answered the other Plaintiffs' discovery on the
9 issue of conspiracy as it relates to REI. REI had no documents related to communications
10 between REI and the other Defendants about natural gas prices and had no documents in
11 which REI directed a subsidiary's communications, price reporting, or trading. (Partial Tr.
12 (Doc. #1128) at 49-50.) REI objected to the extent that Plaintiffs sought every
13 communication made by its subsidiary, RES, to other alleged co-conspirators. Such
14 communications would not demonstrate REI's participation in a conspiracy, and thus would
15 not demonstrate REI was a member of a conspiracy directed at Missouri. The Court has
16 denied Plaintiffs' motion to compel discovery raising these issues. (Pls.' Mot. to Compel
17 Disc. from Def. Reliant Energy, Inc. (Doc. #910) & Mem. in Supp. (Doc. #911); Order
18 (Doc. #1240).) The Court therefore will decline Plaintiffs' request to defer the personal
19 jurisdiction issue to be resolved with the merits.

20 The Court will not attribute RES's contacts with the forum to REI, and REI has
21 no contacts of its own sufficient to support personal jurisdiction. The Court therefore will
22 grant REI's motion to dismiss for lack of personal jurisdiction.

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26 ///

1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant Reliant Energy, Inc.'s Motion to
3 Dismiss for Lack of Personal Jurisdiction (Doc. #1291) is hereby GRANTED. Defendant
4 Reliant Energy, Inc. is hereby dismissed from this action for lack of personal jurisdiction.

5
6 DATED: February 23, 2009

7
8 
9 PHILIP M. PRO
United States District Judge